



ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA-R04-OAR-2022-0219; FRL-9911-01-R4]

Air Plan Approval; Mississippi; Revision of Excess Emissions Provisions

AGENCY: Environmental Protection Agency (EPA).

ACTION: Proposed rule.

SUMMARY: The Environmental Protection Agency (EPA) is proposing to approve a State Implementation Plan (SIP) revision submitted by the Mississippi Department of Environmental Quality (MDEQ) on November 17, 2016, on behalf of the State of Mississippi. The revision was submitted in response to EPA's SIP call published on June 12, 2015, concerning excess emissions during startup, shutdown, and malfunction (SSM) events. The submittal requests the revision of provisions identified in the 2015 SIP call for the Mississippi SIP. EPA is proposing approval of the SIP revision and proposing to determine that such SIP revision corrects the deficiencies identified in the June 12, 2015, SIP call.

DATES: Comments must be received on or before **[INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER]**.

ADDRESSES: Submit your comments, identified by Docket ID No. EPA-R04-OAR-2022-0219 at www.regulations.gov. Follow the online instructions for submitting comments. Once submitted, comments cannot be edited or removed from Regulations.gov. EPA may publish any comment received to its public docket. Do not submit electronically any information you consider to be Confidential Business Information (CBI) or other information whose disclosure is restricted by statute. Multimedia submissions (audio, video, etc.) must be accompanied by a written comment. The written comment is considered the official comment and should include discussion of all points you wish to make. EPA will generally not consider comments or

comment contents located outside of the primary submission (i.e., on the web, cloud, or other file sharing system). For additional submission methods, the full EPA public comment policy, information about CBI or multimedia submissions, and general guidance on making effective comments, please visit www2.epa.gov/dockets/commenting-epa-dockets.

FOR FURTHER INFORMATION CONTACT: D. Brad Akers, Air Regulatory Management Section, Air Planning and Implementation Branch, Air and Radiation Division, U.S.

Environmental Protection Agency, Region 4, 61 Forsyth Street, SW, Atlanta, Georgia 30303-8960. Mr. Akers can be reached via electronic mail at akers.brad@epa.gov or via telephone at (404) 562-9089.

SUPPLEMENTARY INFORMATION:

I. Background

On February 22, 2013, EPA issued a Federal Register notice of proposed rulemaking outlining EPA's policy at the time with respect to SIP provisions related to periods of SSM. EPA analyzed specific SSM SIP provisions and explained how each one either did or did not comply with the Clean Air Act (CAA or Act) with regard to excess emission events.¹ For each SIP provision that EPA determined to be inconsistent with the CAA, EPA proposed to find that the existing SIP provision—an exemption or director's discretion provision—was substantially inadequate to meet CAA requirements and thus proposed to issue a SIP call under CAA section 110(k)(5). On September 17, 2014, EPA issued a document supplementing and revising what the Agency had previously proposed on February 22, 2013, in light of a United States Court of Appeals for the District of Columbia Circuit decision that determined the CAA precludes authority of EPA to create affirmative defense provisions applicable to private civil suits. EPA outlined its updated policy that affirmative defense SIP provisions are not consistent with CAA requirements. EPA proposed in the supplemental proposal document to apply its revised

¹ State Implementation Plans: Response to Petition for Rulemaking; Findings of Substantial Inadequacy; and SIP Calls To Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown, and Malfunction, 78 FR 12460 (February 22, 2013).

interpretation of the CAA to specific affirmative defense SIP provisions and proposed SIP calls for those provisions where appropriate. *See* 79 FR 55920 (September 17, 2014).

On June 12, 2015, pursuant to CAA section 110(k)(5), EPA finalized “State Implementation Plans: Response to Petition for Rulemaking; Restatement and Update of EPA’s SSM Policy Applicable to SIPs; Findings of Substantial Inadequacy; and SIP Calls To Amend Provisions Applying to Excess Emissions During Periods of Startup, Shutdown and Malfunction,” 80 FR 33839 (June 12, 2015), hereinafter referred to as the “2015 SSM SIP Action.” The 2015 SSM SIP Action clarified, restated, and updated EPA’s interpretation that SSM exemption and affirmative defense SIP provisions are inconsistent with CAA requirements. The 2015 SSM SIP Action found that certain SIP provisions in 36 states, including Mississippi, were substantially inadequate to meet CAA requirements and issued a SIP call to those states to submit SIP revisions to address the inadequacies. EPA established an 18-month deadline by which the affected states had to submit such SIP revisions. States were required to submit corrective revisions to their SIPs in response to the SIP calls by November 22, 2016.

EPA issued a memorandum in October 2020 (2020 Memorandum), which stated that certain provisions governing SSM periods in SIPs could be viewed as consistent with CAA requirements.² Importantly, the 2020 Memorandum stated that it “did not alter in any way the determinations made in the 2015 SSM SIP Action that identified specific state SIP provisions that were substantially inadequate to meet the requirements of the Act.” Accordingly, the 2020 Memorandum had no direct impact on the SIP call issued to Mississippi in 2015. The 2020 Memorandum did, however, indicate EPA’s intent at the time to review SIP calls that were issued in the 2015 SSM SIP Action to determine whether EPA should maintain, modify, or withdraw particular SIP calls through future agency actions.

On September 30, 2021, EPA’s Deputy Administrator withdrew the 2020 Memorandum

² October 9, 2020, memorandum “Inclusion of Provisions Governing Periods of Startup, Shutdown, and Malfunctions in State Implementation Plans,” from Andrew R. Wheeler, Administrator.

and announced EPA’s return to the policy articulated in the 2015 SSM SIP Action (2021 Memorandum).³ As articulated in the 2021 Memorandum, SIP provisions that contain exemptions or affirmative defense provisions are not consistent with CAA requirements and, therefore, generally are not approvable if contained in a SIP submission. This policy approach is intended to ensure that all communities and populations, including minority, low-income and indigenous populations overburdened by air pollution, receive the full health and environmental protections provided by the CAA.⁴ The 2021 Memorandum also retracted the prior statement from the 2020 Memorandum regarding EPA’s plans to review and potentially modify or withdraw particular SIP calls. That statement no longer reflects EPA’s intent. EPA intends to implement the principles laid out in the 2015 SSM SIP Action as the Agency takes action on SIP submissions, including the November 17, 2016, SIP submittal provided by MDEQ in response to the 2015 SIP call.

With regard to the Mississippi SIP, in the 2015 SSM SIP Action, EPA determined that 11-1-2 Miss. Code R. 10, *Provisions for Upsets, Startups, and Shutdowns*, at sections 10.1, 10.2, and 10.3, were substantially inadequate to meet CAA requirements. *See* 80 FR 33839, 33963 (June 12, 2015). These provisions have since been recodified as Title 11 of the Mississippi Administrative Code, Part 2, Chapter 1, Rule (11 Miss. Admin. Code, Pt. 2, Ch.1, R.) 1.10, *Provisions for Upsets, Startups, and Shutdowns*, at sections 1.10.A, 1.10.B, and 1.10.C.⁵

In the existing SIP, Rule 1.10.A, *Upsets*, generally provides that the occurrence of an “upset,” which is consistent with EPA’s description of “malfunction” in the 2015 SSM SIP Action, “constitutes an affirmative defense to an enforcement action brought for noncompliance with emission standards or other requirements of Applicable Rules and Regulations or any applicable permit if the source demonstrates through properly signed contemporaneous operating

³ September 30, 2021, memorandum “Withdrawal of the October 9, 2020, Memorandum Addressing Startup, Shutdown, and Malfunctions in State Implementation Plans and Implementation of the Prior Policy,” from Janet McCabe, Deputy Administrator.

⁴ *See* 80 FR 33839, 33985.

⁵ EPA approved the non-substantive recodification of MDEQ’s rules in a letter notice on February 21, 2020. *See* 85 FR 10070.

logs, or other relevant evidence that include” specific information listed in the Rule. Next, in the existing SIP, Rule 1.10.B, *Startups and Shutdowns*, generally provides that “[e]missions limitations applicable to normal operation apply during startups and shutdowns” except in circumstances outlined in the Rule, including “infrequent” periods of startups and shutdowns for which the “duration of excess emissions is brief.” Finally, in the existing SIP, Rule 1.10.C generally provides that while maintenance should be performed during planned shutdown or repair, “[u]navoidable maintenance that results in brief periods of excess emissions and that is necessary to prevent or minimize emergency conditions or equipment malfunctions constitutes an affirmative defense to an enforcement action brought for noncompliance with emission standards, or other regulatory requirements” if the source can demonstrate that certain criteria in the Rule are met. The rationale underlying EPA’s determination that the provisions were substantially inadequate to meet CAA requirements, and its decision to therefore issue a SIP call to Mississippi to remedy the deficiencies, is detailed in the 2015 SSM SIP Action and the accompanying proposals.

Mississippi submitted a SIP revision on November 17, 2016, in response to the SIP call issued in the 2015 SSM SIP Action. In its submission, Mississippi is requesting that EPA revise the Mississippi SIP by: 1) Removing Rule 1.10.A from the Mississippi SIP; 2) revising Rule 1.10.B by deleting exemptions for excess emissions during periods of startup or shutdown, instead providing that emission limitations apply at all times, including startups and shutdowns, unless alternative emission limitations (AELs) are developed for such periods in accordance with requirements in the rule, including that AELs must be incorporated into a permit and are effective for State purposes only until incorporated into Rule 1.10.B and approved by EPA into the SIP; and 3) removing Rule 1.10.C from the Mississippi SIP.

II. Analysis of the November 17, 2016, SIP Submission

Regarding Rule 1.10.A, Mississippi is requesting that this provision be removed in its entirety from the SIP. Mississippi is retaining Rule 1.10.A for state law purposes only, with

revisions to, among other things, clarify that the upset provisions of Rule 1.10.A apply to enforcement actions by the State (specifically, the Mississippi Commission on Environmental Quality) only and “are not intended to prohibit EPA or third-party enforcement actions.”

Mississippi provided the text of Rule 1.10.A in the November 17, 2016 SIP submission solely for informational purposes to show a complete record of the changes adopted; the State does not request approval of the revised provision into the SIP. Based on Mississippi’s request to remove Rule 1.10.A from the Mississippi SIP, EPA proposes to approve that removal because it is consistent with CAA requirements and adequately addresses the specific deficiencies that EPA identified in the 2015 SSM SIP Action with respect to this provision.

Regarding the changes to Rule 1.10.B, the revised rule included for incorporation into Mississippi’s SIP provides at B(1) that emission limitations apply during startups and shutdowns “unless source specific emission limitations or work practice standards for startups and shutdowns are defined by an applicable rule, regulation, or permit.” Rule 1.10.B(2) goes on to provide that where a source is unable to comply with existing SIP emission limitations during startups and shutdowns, MDEQ may establish source-specific emission limitations or work practice standards, i.e., AELs, which would be effective for State purposes only until submitted to and approved by EPA as SIP revisions. Paragraphs (a), (b), and (c) of Rule 1.10.B(2) set forth requirements to which any such AELs are subject. These requirements (e.g., minimization of the frequency and duration of operation in startup and shutdown mode) are consistent with the criteria EPA recommended in the 2015 SSM SIP Action for such AELs.⁶ Last, Rule 1.10.B(3), as revised, simply notes that if an “upset” occurs during a startup or shutdown period, the upset provisions of Rule 1.10.A apply. As noted previously, MDEQ is requesting that upset provisions be removed from the SIP, is retaining them for state law purposes only, and is not submitting the

⁶ See 80 FR 33839, 33980 (recommending seven specific criteria as appropriate considerations for developing emission limitations in SIP provisions that apply during startup and shutdown).

revised upset provisions for approval in the SIP. Thus, the existing Rule 1.10.B(3)⁷ is requested to be removed from the SIP, and the revised Rule 1.10.B(3) is not being requested for SIP approval.⁸

Taken together, the changes to Rule 1.10.B(1) and (2) provide that emission limitations in the Mississippi SIP apply at all times, including periods of startup and shutdown, and that AELs can be developed in specific circumstances for inclusion in the SIP as source-specific AELs, which the State refers to as “source specific emission limitations or work practice standards.” Moreover, Rule 1.10.B(2) provides that these AELs must be developed using considerations consistent with EPA guidance discussed in the 2015 SSM SIP Action.⁹ SIP emission limitations remain federally enforceable during periods of startup and shutdown unless and until source specific alternative limitations are established by an applicable rule, regulation, or permit and are approved into the SIP. Therefore, based on Mississippi’s changes to Rule 1.10.B and the State’s request to include the revised language in the Mississippi SIP, EPA proposes to find that Mississippi’s November 17, 2016, SIP revision is consistent with CAA requirements and adequately addresses the specific deficiencies that EPA identified in the 2015 SSM SIP Action with respect to this provision in the Mississippi SIP.

Finally, regarding the changes to Rule 1.10.C, Mississippi requested that EPA remove this provision from the Mississippi SIP and removed it from the Mississippi Administrative Code. Based on Mississippi’s request to remove Rule 1.10.C from the Mississippi SIP, EPA proposes to find that Mississippi’s November 17, 2016, SIP revision is consistent with CAA requirements and adequately addresses the specific deficiencies that EPA identified in the 2015 SSM SIP Action with respect to this provision in the Mississippi SIP.

⁷ The existing SIP-called version of Rule 1.10.B(3) provides that if Rule 1.10.B conflicts with other requirements for startup and shutdown, then the more stringent requirement applies.

⁸ On April 19, 2022, EPA received email confirmation from MDEQ that Rule 1.10.B(3), as revised, is not submitted for approval into the SIP. See the document titled “MS-52 SSM SIP Call Response Email Clarification_4-19-2022.pdf” in the docket for this proposed action.

⁹ See Memorandum to EPA Regional Administrators, Regions I–X from Steven A. Herman and Robert Perciasepe, USEPA, “State Implementation Plans: Policy Regarding Excess Emissions During Malfunctions, Startup, and Shutdown” (September 20, 1999).

III. Incorporation by Reference

In this document, EPA is proposing to include in a final EPA rule regulatory text that includes incorporation by reference. In accordance with requirements of 1 CFR 51.5, as discussed in Sections I and II of this preamble, EPA is proposing to incorporate by reference 11 Mississippi Administrative Code, Part 2, Chapter 1, Rule 1.10, *Provisions for Upsets, Startups, and Shutdowns*, state effective December 10, 2016, except for Rule 1.10.A and 1.10.B(3), which MDEQ is not requesting EPA incorporate into the SIP. EPA has made, and will continue to make, these materials generally available through www.regulations.gov and at the EPA Region 4 office (please contact the person identified in the “For Further Information Contact” section of this preamble for more information).

IV. Proposed Action

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the CAA and applicable Federal regulations. *See* 42 U.S.C. 7410(k); 40 CFR 52.02(a). EPA is proposing to approve Mississippi’s November 17, 2016, SIP submission requesting changes to 11 Mississippi Administrative Code, Part 2, Chapter 1, Rule 1.10, *Provisions for Upsets, Startups, and Shutdowns*, into the Mississippi SIP. Specifically, EPA is proposing to remove Rule 1.10.A and Rule 1.10.C from the Mississippi SIP, and to approve the revised version of Rule 1.10.B into the Mississippi SIP, except for Rule 1.10.B(3), which EPA is proposing to remove from the SIP. EPA is proposing approval of the SIP revision because the Agency has determined that it is consistent with the requirements for SIP provisions under the CAA. EPA is further proposing to determine that such SIP revision adequately addresses the specific deficiencies that EPA identified in the 2015 SSM SIP Action with respect to the Mississippi SIP. EPA is not reopening the 2015 SSM SIP Action and is taking comment only on whether this SIP revision is consistent with CAA requirements and whether it addresses the substantial inadequacy in the specific Mississippi SIP provisions (originally 11–1–2 Miss. Code R. sections 10.1, 10.2, and 10.3, since recodified as 11 Miss. Admin. Code, Pt. 2, Ch. 1, R. 1.10,

sections 1.10.A, 1.10.B, and 1.10.C) identified in the 2015 SSM SIP Action.

V. Statutory and Executive Order Reviews

Under the CAA, the Administrator is required to approve a SIP submission that complies with the provisions of the Act and applicable Federal regulations. *See* 42 U.S.C. 7410(k); 40 CFR 52.02(a). Thus, in reviewing SIP submissions, EPA's role is to approve state choices, provided that they meet the criteria of the CAA. This action merely proposes to approve state law as meeting Federal requirements and does not impose additional requirements beyond those imposed by state law. For that reason, this proposed action:

- Is not a significant regulatory action subject to review by the Office of Management and Budget under Executive Orders 12866 (58 FR 51735, October 4, 1993) and 13563 (76 FR 3821, January 21, 2011);
- Does not impose an information collection burden under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501 *et seq.*);
- Is certified as not having a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*);
- Does not contain any unfunded mandate or significantly or uniquely affect small governments, as described in the Unfunded Mandates Reform Act of 1995 (Public Law 104-4);
- Does not have Federalism implications as specified in Executive Order 13132 (64 FR 43255, August 10, 1999);
- Is not an economically significant regulatory action based on health or safety risks subject to Executive Order 13045 (62 FR 19885, April 23, 1997);
- Is not a significant regulatory action subject to Executive Order 13211 (66 FR 28355, May 22, 2001);

- Is not subject to requirements of section 12(d) of the National Technology Transfer and Advancement Act of 1995 (15 U.S.C. 272 note) because application of those requirements would be inconsistent with the CAA; and
- Does not provide EPA with the discretionary authority to address, as appropriate, disproportionate human health or environmental effects, using practicable and legally permissible methods, under Executive Order 12898 (59 FR 7629, February 16, 1994).

The SIP is not approved to apply on any Indian reservation land or in any other area where EPA or an Indian tribe has demonstrated that a tribe has jurisdiction. In those areas of Indian country, the rule does not have tribal implications as specified by Executive Order 13175 (65 FR 67249, November 9, 2000), nor will it impose substantial direct costs on tribal governments or preempt tribal law.

List of Subjects in 40 CFR Part 52

Environmental protection, Air pollution control, Carbon monoxide, Incorporation by reference, Intergovernmental relations, Lead, Nitrogen dioxide, Ozone, Particulate matter, Reporting and recordkeeping requirements, Sulfur oxides, Volatile organic compounds.

Authority: 42 U.S.C. 7401 *et seq.*

Dated: May 31, 2022.

Daniel Blackman,
Regional Administrator,
Region 4.

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